

**AMNESTY INTERNATIONAL
SUBMISSION TO THE
US DEPARTMENT OF STATE
COMMISSION ON
UNALIENABLE RIGHTS**

20 May 2020

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

First published in 2020 by
Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Amnesty International 2020

Index: AMR 51/2375/2020
Original Language: English

All rights reserved. This publication is copyright, but may be reproduced by any method without fee for advocacy, campaigning and teaching purposes, but not for resale. The copyright holders request that all such use be registered with them for impact assessment purposes. For copying in any other circumstances, or for reuse in other publications, or for translation or adaptation, prior written permission must be obtained from the publishers, and a fee may be payable. To request permission, or for any other inquiries, please contact copyright@amnesty.org

Amnesty International is a global movement of millions of supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion, and are funded mainly by our membership and public donations.

**AMNESTY
INTERNATIONAL**



Amnesty International submission to the US Department of State Commission on Unalienable Rights

20 May 2020

Introduction

1. Amnesty International¹ is grateful for the opportunity to provide this written submission to the US Department of State's advisory Commission on Unalienable Rights ("Commission"), as the Commission formulates and finalizes its advisory report to the Secretary of State.
2. Per its mandate, the Commission "provides advice and recommendations on human rights to the Secretary of State, grounded in our nation's founding principles and the 1948 Universal Declaration of Human Rights."²
3. Representatives of Amnesty International attended all five of the monthly public meetings of the Commission, which were held exclusively from October 2019 to February 2020 (following which the Commission canceled its sixth and final public meeting, scheduled for March 2020).³
4. Numerous members of the US Congress,⁴ faith leaders,⁵ and representatives of a wide variety of nongovernmental organizations (NGOs),⁶ among others, have raised grave

¹ Founded in 1961, Amnesty International is a global movement of millions of members and supporters, which regularly documents and advocates for the protection of human rights in over 150 countries. Amnesty International has national offices in 65 countries, including the United States.

² See, Charter for the Commission on Unalienable Rights (July 2019), available at: <https://www.state.gov/charter-for-the-commission-on-unalienable-rights/>.

³ The agenda and limited notes from each of those meetings are available on the website of the US Department of State at: <https://www.state.gov/commission-on-unalienable-rights>.

⁴ See, Letter signed by five Senators, calling on Secretary of State Michael R. Pompeo to refrain from establishing the Commission (12 June 2019), available at: <https://www.foreign.senate.gov/press/ranking/release/menendez-leahy-durbin-shaheen-coons-raise-alarm-over-trump-administrations-plans-to-redefine-human-rights-through-new-commission->. See also, Letter signed by 22 Senators opposing the creation of the Commission (23 July 2019), available at: <https://www.foreign.senate.gov/press/ranking/release/menendez-leads-22-democratic-senators-in-letter-opposing-state-department-commission-set-to-redefine-human-rights>. See also, Letter signed by 50 members of the US House of Representatives, opposing the establishment of the Commission (18 July 2019), available at: <https://foreignaffairs.house.gov/2019/7/50-house-democrats-demand-answers-on-pompeo-s-unalienable-rights-commission>.

⁵ See, American Jewish World Service statement and coalition letter, "Leading Jewish Global Human Rights Group Mobilizes More than 300 Jewish Clergy Members to Urge US State Department to Disband Commission on Unalienable Rights" (26 March 2020), available at: <https://ajws.org/press-releases/leading-jewish-global-human-rights-group-mobilizes-more-than-300-jewish-clergy-members-to-urge-u-s-state-department-to-disband-commission-on-unalienable-rights/>. See also, "Interfaith Letter to Secretary Pompeo Regarding Commission on Unalienable Rights" (27 April 2020), submitted by 51 organizations and hundreds of faith leaders; available at: <https://srhrforall.org/download/interfaith-letter-to-secretary-pompeo-regarding-commission-on-unalienable-rights/?wpdmdl=2297&refresh=5ec3e8c9232291589897417>.

⁶ See, Coalition letter to the Secretary of State regarding the establishment of the Commission on Unalienable Rights, signed by 178 NGOs (including Amnesty International USA) and over 250 individual experts and others (22 July 2019), available at: <https://www.humanrightsfirst.org/resource/coalition-letter-secretary-state-mike-pompeo-commission-unalienable-rights/>.

and consistent concerns about the mandate, establishment, and procedures of this Commission.

5. Those concerns are also currently the focus of an administrative lawsuit under the Federal Advisory Committee Act (FACA).⁷ Amnesty International is supportive of that lawsuit, having directly documented that the Commission has continuously been and remains in violation of FACA. In that regard, Amnesty International laments that the Department of State and this Commission have until now failed to collate and make publicly available all records required under FACA,⁸ which would have enhanced this and other organizations' ability to follow, understand, and participate in the Commission's deliberations.

6. Amnesty International has reviewed and agrees with the extensive substantive concerns and criticisms that human rights experts,⁹ academic institutions, NGOs, and others have already presented in their written submissions to the Commission. Those criticisms have included, *inter alia*: apparent conflicts of the Commission's approach with principles of international human rights law;¹⁰ and concerns that the Department of State is aiming to utilize the advice and recommendations of this Commission to discriminate against, and undermine human rights protections for, women and LGBTI people;¹¹ to narrow international protections for human rights;¹² and to promote a culturally relativist vision of human rights that could embolden some governments to do the same as they engage in wholesale human rights violations.¹³

7. Given that those aspects of the Commission's project are already thoroughly addressed in other organizations' inputs, Amnesty International has focused this submission on how the Department of State could more responsibly contribute to the United States' improved participation in the development of human rights law. This submission correspondingly outlines how increased cooperation of the United States

⁷ See, Democracy Forward statement, "Human Rights Orgs Sue Sec. Pompeo for Unlawful Commission Designed to Redefine Human Rights, Undercut Universal Protections for Women, LGBTQI Individuals and Others" (6 March 2020), available at: <https://democracyforward.org/press/human-rights-orgs-sue-sec-pompeo>. See also, Complaint, *R.F.K. Human Rights, CHANGE, Council for Global Equality, Global Justice Center v. Pompeo* (6 March 2020), available at: <https://democracyforward.org/wp-content/uploads/2020/03/Complaint-As-Filed.pdf>.

⁸ FACA requirements on recordkeeping are provided under 5 USC (FACA), Appendix, §10(b) and (c), available at: <https://www.govinfo.gov/content/pkg/USCODE-2012-title5/pdf/USCODE-2012-title5-app-federalad.pdf>. See also, US National Archives, Frequently Asked Questions (FAQs), Federal Advisory Committee Records, General Records Schedule 6.2, Transmittal No. 26 (September 2016), available at: <https://www.archives.gov/files/records-mgmt/grs/grs06-2-faqs.pdf>.

⁹ See, Submission from Professor Gerald L. Neuman to the Commission on Unalienable Rights (18 March 2020), available at: <https://hrp.law.harvard.edu/wp-content/uploads/2020/03/Submission-of-Prof.-Gerald-Neuman03182020-1.pdf>.

¹⁰ See, Duke International Human Rights Clinic, joint submission to Commission on Unalienable Rights (7 May 2020), available at: <https://web.law.duke.edu/news/duke-international-human-rights-clinic-makes-joint-submission-pompeos-rights-commission/>.

¹¹ See, Human Rights Watch, statement and submission to the Commission on Unalienable Rights (5 May 2020), available at: <https://www.hrw.org/news/2020/05/05/us-state-department-should-affirm-rights-all>.

¹² See, Testimony and remarks to the Commission on Unalienable Rights by Freedom House President Michael J. Abramowitz, "US Leadership in the Reinforcement of Human Rights" (11 December 2019), available at: <https://freedomhouse.org/article/us-leadership-reinforcement-human-rights>.

¹³ See, Human Rights First, "HRF Concern Regarding Commission on Unalienable Rights" (14 April 2020), available at: <https://www.humanrightsfirst.org/press-release/hrf-concern-regarding-commission-unalienable-rights>.

with international human rights institutions and mechanisms could contribute to the broader global realization of human rights, in line with the UDHR, international law, and the obligations assumed by the United States thereunder.

8. For ease of reference, these topics are elaborated upon below under three headings that directly correspond to the three thematic subcommittees (“working groups”) of the Commission on Unalienable Rights (as relayed to Amnesty International by the Department of State staffer to the Commission), namely:

- I. What does it mean for advice on human rights in US foreign policy to be grounded in America’s founding principles?
- II. What does it mean for advice on human rights in US foreign policy to be grounded in the international principles to which the United States ascribed after World War Two?
- III. What role should human rights play in US foreign policy?

I. What does it mean for advice on human rights in US foreign policy to be grounded in America’s founding principles?

9. In May 2019 in the *Federal Register*, the US Department of State submitted the following as the “nature and purpose” of the Commission upon its establishment: “The Commission will provide fresh thinking about human rights discourse where such discourse has departed from our nation’s founding principles of natural law and natural rights.”¹⁴

10. A false and misleading presumption of the Commission’s stated purpose is that post-World War Two international human rights law, and international discourse arising from it, are based on natural law and natural rights. The Secretary of State has also made this assertion in other public statements in relation to the Commission.

11. As the Department of State established the Commission on Unalienable Rights in July 2019 to determine which rights were “unalienable,” the Secretary simultaneously announced at the Ministerial to Advance Religious Freedom, as a foregone conclusion, that freedom of religion or belief would be chief among those “unalienable rights” to be championed:

“The Trump Administration prioritizes the protection of the unalienable right of religious freedom. The Trump Administration champions the protection of unalienable rights like religious freedom, grounded in our nation’s founding principles. Religious freedom is a universal human right, and key to the protection of other unalienable rights, including freedom of speech and assembly.”¹⁵

¹⁴ See, Notice by the US Department of State on 30 May 2019, establishing the Commission on Unalienable Rights, available at: <https://www.federalregister.gov/documents/2019/05/30/2019-11300/department-of-state-commission-on-unalienable-rights>.

¹⁵ See, Opening Remarks by Secretary Pompeo, 2019 Ministerial to Advance Religious Freedom (16 July 2019), available at: <https://www.state.gov/2019-ministerial-to-advance-religious-freedom/>.

12. The day before the first meeting of the Commission in October 2019, the Secretary of State publicly asserted that the Commission’s forthcoming advisory report is intended “to take and reground the rights that we talk about in the traditions of America,” to “be a true marker for the world to talk about human rights in the right way,” and that human rights discourse should be “consistent with the American tradition.”¹⁶

13. In the Commission’s first meeting in October 2019, its executive secretary Mr. Peter Berkowitz,¹⁷ who also serves as chair of its subcommittee on “America’s founding principles,” asked the first invited speaker whether “unalienable rights” and “human rights” share the same meaning.

14. The invited speaker, Prof. Michael W. McConnell,¹⁸ responded: “As to the first question of whether unalienable rights are simply an 18th-century vocabulary for the same thing you mean as human rights, I am probably the wrong person to ask. I am not a scholar of modern international human rights law. I’m actually skeptical of much of it.” He continued: “an unalienable right [...] is not a legal or constitutional concept. This is a political theory concept that has to do with the formation of constitutions, rather than the interpretation of constitutions by judges. [...] Unfortunately, ‘unalienable rights’ is not a term that had a single meaning at the time of the founding.”¹⁹

15. Despite the Commission on Unalienable Rights having selected a human rights skeptic to unpack what “unalienable rights” means, the invited speaker made clear that so-called “unalienable rights” did not have a monolithic meaning even at the time of the founding of the United States. This underscores another reason that the non-legal concept of “unalienable rights” cannot serve as a premise to restrict the scope of international human rights law, in accordance with some individuals’ views on natural rights at the time of the founding of the United States, nearly 250 years ago.

II. What does it mean for advice on human rights in US foreign policy to be grounded in the international principles to which the United States ascribed after World War Two?

16. In June 2018, the US Secretary of State said in his rationale for the United States’ abandoning of its seat on the UN Human Rights Council: “The Trump administration is committed to protecting and promoting the God-given dignity and freedom of every human being. Every individual has rights that are inherent and inviolable. They are given by God, and not by government. Because of that, no government must take them away.”²⁰

¹⁶ See, Speech of the Secretary of State, “Trump Administration Diplomacy: The Untold Story” (22 October 2019), available at: <https://www.state.gov/trump-administration-diplomacy-the-untold-story/>.

¹⁷ Mr. Berkowitz is also a fellow at the Hoover Institution, who is currently serving as director of the Department of State’s Policy Planning Staff in the office of the Secretary.

¹⁸ Prof. McConnell is a professor of law at Stanford University, a former federal appellate court judge, and a senior fellow at the Hoover Institution.

¹⁹ Remarks of Prof. McConnell, at the first meeting of the Commission on Unalienable Rights (23 October 2019).

²⁰ See, US Department of State, “Remarks by Mike Pompeo, Secretary of State and Nikki Haley, US Permanent Representative to the United Nations” (19 June 2018), available at:

17. In an April 2020 conference call with conservative pastors, hosted by the Family Research Council's Tony Perkins,²¹ the Secretary of State specifically complained that the US Department of State has previously promoted human rights "that we all know as Christian believers aren't part of the inherent dignity of a human being."²² He cited this as his basis for establishing the Commission on Unalienable Rights, in order to subordinate international human rights law to a specific Judeo-Christian religious tradition:

"And so, I set about creating a group that would study this, review this, and with the mission set to say, what are those unalienable rights? What are the set of God-given rights that every human being possesses by nature of their humanness? So, by middle of May or first of June, we will have that report come back. And I think it will return America's understanding of human rights—at least at the State Department, I hope more broadly—back to the fundamental moorings of the Judeo-Christian tradition on which this country was founded, to take this idea of rights and human rights back to the foundational ideas that have made this civilization, this country here, so unique and so special. I'm really looking forward to having that report complete and then sharing that with my team and with the world."²³

18. Regardless of the peculiar history of the United States – and the religious or other beliefs of its founders – the drafters of the Universal Declaration on Human Rights (UDHR) decidedly chose *not* to root the international recognition of human rights, and the concept of human dignity, in any religion.²⁴ Instead, they deliberately excluded references to religious principles as the source of the "inherent dignity and of the equal and inalienable rights of all members of the human family"²⁵ at the opening of the preamble of the UDHR, and later reaffirmed that all the rights recognized in the UDHR are "inalienable."²⁶

19. Moreover, the United States and other governments recognized in their adoption of the UDHR that, regardless of the origins of human rights, "human rights should be

<https://geneva.usmission.gov/2018/06/21/remarks-on-the-un-human-rights-council/>.

²¹ Mr. Perkins serves as chair of the US Commission on International Religious Freedom:

<https://www.uscirf.gov/about-uscirf/tony-perkins-chair>. He is also the longstanding president of the Family Research Council, which the Southern Poverty Law Center has designated as an anti-LGBT hate group: <https://www.splcenter.org/fighting-hate/extremist-files/individual/tony-perkins>.

²² See, Peter Montgomery, "Mike Pompeo Says Unalienable Rights Commission Will Return Human Rights Policy to 'Judeo-Christian Tradition on Which this Country Was Founded'" (13 April 2020), available at: <https://www.rightwingwatch.org/post/mike-pompeo-says-unalienable-rights-commission-will-return-human-rights-policy-to-judeo-christian-tradition-on-which-this-country-was-founded/>.

²³ Ibid.

²⁴ See, Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999/2010), Chapter 8, "Article 1, the Preamble, and the Enlightenment," at pp. 281–328.

²⁵ Universal Declaration of Human Rights, adopted 10 December 1948; available at: https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf.

²⁶ In the Proclamation of Tehran, adopted by the United Nations International Conference on Human Rights in 1968, the United States and other countries reaffirmed as inalienable all the rights they had recognized in the UDHR, which "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community." See, Final Act of the International Conference on Human Rights (Tehran, 22 April to 13 May 1968), para. 2 (at p. 4). Available at: https://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf.

protected by the rule of law.”²⁷ In keeping with that spirit, by ratifying international human rights treaties, governments guarantee that they will adopt legal protections for human rights provided by those treaties to which they are party. The US government has itself stated this recognition as a basis for its failure to adopt the majority of international human rights treaties since World War Two, not wanting to be legally bound to respect and ensure all human rights recognized in the UDHR, which authorities claimed could come into conflict with US laws.²⁸

20. That aside, both the UDHR and the International Covenant on Civil and Political Rights (ICCPR) – the latter of which the United States has ratified and agreed to be bound by – provide that the freedom of religion or belief does *not* permit the invocation of that human right as a basis for the denial of other human rights provided by the UDHR or ICCPR, particularly when such a denial of human rights is based on any form of discrimination against a social group, which both instruments prohibit as a matter of principle.²⁹

21. Contrary to those standards under international law,³⁰ the Secretary of State has consistently supported the prioritization of freedom of religion or belief over all other rights with which it may come into conflict.³¹

22. In February 2020, the Department of State promulgated a “Declaration of Principles for the International Religious Freedom Alliance,”³² a coalition of countries the US government has assembled to advance its vision of religious freedom. The Declaration cited among its legal underpinnings the UDHR, the ICCPR, and the EU Guidelines on Freedom of Religion or Belief. Notably, the EU Guidelines accurately reflect international consensus on the scope and content of religious freedom – including the scope of permitted restrictions on its manifestation to protect the rights of others, providing:

²⁷ Ibid.

²⁸ For examples, see e.g., Mark Kirk, “Should the United States ratify the American Convention on Human Rights?” (San José: *Revista IIDH*, Vol. 14; 1991), at pp. 65-89. Available at: <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/14/dtr/dtr4.pdf>.

²⁹ See, Articles 2.1, 5, and 18.3 of the ICCPR; and Articles 7 and 30 of the UDHR. See also, Report of the United Nations Special Rapporteur on Freedom of Religion or Belief, Dr. Ahmed Shaheed, UN Doc. A/HRC/43/48 (27 February 2020), at paras. 60 to 67. Available at: <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>.

³⁰ Ibid.

³¹ The Secretary has frequently referred to freedom of religion or belief as the most important human right, reigning over all others, calling it interchangeably: the “most fundamental of human rights” (<https://www.state.gov/secretary-michael-r-pompeo-with-tony-perkins-of-washington-watch-with-tony-perkins-2/>); “the most fundamental of unalienable rights” (<https://twitter.com/SecPompeo/status/1188441054611197952>); “our most foundational and cherished of unalienable rights” (<https://twitter.com/SecPompeo/status/1182740389788303365>); and “this first freedom, this important and unalienable right” (<https://www.state.gov/secretary-michael-r-pompeo-at-the-united-nations-event-on-religious-freedom/>).

³² See, Department of State, “Declaration of Principles for the International Religious Freedom Alliance” (5 February 2020), available at: <https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/>.

“As opposed to the freedom to have a religion, to hold a belief or not to believe, the freedom to manifest one’s religion or belief may be subject to limitations, but ‘only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.’ [...] Certain practices associated with the manifestation of a religion or belief, or perceived as such, may constitute violations of international human rights standards. The right to freedom of religion or belief is sometimes invoked to justify such violations. [...] Violations often affect women, members of religious minorities, as well as persons on the basis of their sexual orientation or gender identity.”³³

23. The Secretary of State’s stated effort to redefine international human rights obligations based on US law and history – including through the work of the Commission on Unalienable Rights – also runs counter to the Vienna Convention on the Law of Treaties (VCLT), which the US government has signed, and most of which constitutes customary international law binding on the United States.³⁴ In particular, Article 27 of the VCLT (“Internal Law and Observance of Treaties”) provides: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³⁵

24. The customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties provide a more responsible route by which the US could engage UN human rights machinery in relation to any interpretations of human rights that the administration wishes to challenge.³⁶

25. The Commission on Unalienable Rights should not resurrect the troubling US history of seeking to undermine the standards and development of international human rights law, in order to deny internationally recognized human rights to some rights-holders based on discriminatory motives.³⁷

³³ See, European Union (EU), “EU Guidelines on the promotion and protection of freedom of religion or belief” (24 June 2013), at paras. 13 to 27. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf. The European Parliament reaffirmed those standards in its Resolution of 15 January 2019 on the EU Guidelines and the mandate of the EU Special Envoy on the promotion of freedom of religion or belief outside the EU (2018/2155(INI)), available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0013_EN.html.

³⁴ See, International Law Institute, *Digest of United States Practice in International Law* (2001), at p. 131. Available at: <https://2009-2017.state.gov/documents/organization/139600.pdf>.

³⁵ See, Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969), at Article 27. Available at: https://treaties.un.org/doc/publication/unts/volume_1155/volume-1155-i-18232-english.pdf.

³⁶ Ibid, at Articles 31 and 32.

³⁷ Out of fear that the UDHR would facilitate civil rights claims by African Americans subjected to racial segregation, following the UDHR’s adoption in 1948, Senator John W. Bricker fought from 1951 to 1954 to amend the US Constitution to make all treaties “non-self-executing,” stating: “My purpose in offering this resolution is to bury the so called Covenant on Human Rights so deep that no one holding high public office will ever dare to attempt its resurrection.” (See, The American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, §111 (1987).) President Eisenhower felt that the proposed amendment violated his foreign policy-making powers, and in an attempt to defeat it, his administration promised the United States would not sign any international covenants or conventions on human rights. The Bricker amendment then failed in the Senate in 1954 by a single vote, yet no US presidents signed any of the core UN human rights treaties until President Carter. (See also, Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge University Press, 2003).)

26. The Secretary of State and some members of the Commission on Unalienable Rights have decried a so-called “lack of clarity” in the definition of human rights, which the Commission is supposedly tasked to resolve on its own.³⁸

27. Yet the sources of international law,³⁹ and the rules for the interpretation of human rights treaties,⁴⁰ are well known and clear. So are the authority and competence of UN human rights treaty bodies to comment on the obligations under treaties, of which they are mandated to monitor the performance by UN Member States.⁴¹ Clear also is the persuasive but non-binding nature of the findings and recommendations of Special Procedures of the UN Human Rights Council, and that their communications and thematic studies are primarily intended to promote potential remedies when human rights are in peril.⁴²

28. The United States and other governments are directly involved in the selection and election of the independent experts on UN human rights treaty bodies and Special Procedure mandate holders of the UN Human Rights Council. Indeed, the Department of State is currently putting forward an academic nominee to sit on the UN Human Rights Committee. The nomination of such an academic is one legitimate avenue for the US government to participate in the development of soft law on human rights, without seeking to undermine human rights institutions or to abandon the binding obligations that past US government administrations have joined the international community in recognizing.

29. During the Commission’s fourth public meeting, the chair of its subcommittee on the post-World War Two human rights framework, Prof. Paolo Carozza,⁴³ acknowledged exactly the aforementioned procedure for challenging supposedly expansionist

³⁸ See, e.g., Secretary Pompeo, tweet with photo alongside members of the Commission on the occasion of its first meeting (23 October 2019), available at: <https://twitter.com/SecPompeo/status/1187120876451454976>.

³⁹ See, e.g., Article 38.1 of the Statute of the International Court of Justice (ICJ), available at: <https://www.icj-cij.org/en/statute>. Article 38.1 of the Statute provides: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

⁴⁰ See, above at n. 36.

⁴¹ See, OHCHR, “Human rights treaty bodies” (Monitoring the core international human rights treaties), available at: <https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx>. See also, Geir Ulfstein, “Law-Making by Human Rights Treaty Bodies,” in *International Law-making: Essays in Honour of Jan Klabbers*, edited by Rain Liivoja and Jarna Petman (Routledge, 2014, pp. 249-259), available at: <https://www.duo.uio.no/bitstream/handle/10852/43310/4/Law-making%2Bby%2BHuman%2BRights%2BTreaty%2BBodies.pdf>.

⁴² See, OHCHR, “Special Procedures of the Human Rights Council” (Introduction), available at: <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>. See also, Office of the UN High Commissioner for Human Rights (OHCHR), Manual of Operations of the Special Procedures of the Human Rights Council (August 2008), e.g. at paras. 30 and 106, available at: https://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf.

⁴³ Mr. Carozza is a professor of law and political science at the University of Notre Dame Law School, who is currently serving as the US member on the Venice Commission, and was previously a member and president of the Inter-American Commission on Human Rights.

interpretations of binding human rights obligations. Specifically, in opposition to arguments put forward by Mr. Kenneth Roth⁴⁴ for a positive-law approach to the development of human rights law during his spoken remarks before the Commission in January 2020,⁴⁵ Prof. Carozza observed:

“In the practice and politics of diplomacy of human rights, there are for a fact many assertions of rights that happen that are not grounded in the treaties, that are not grounded in positive law – resolutions that are introduced routinely to recognize new rights or to create new rapporteurships in the Special Procedures, that *the US Government routinely opposes, for better or for worse*, because they are creating new rights. In particular, *the US has had a consistent practice across administrations both Democratic and Republican*, of opposing collective rights, for example, as opposed to individual rights, and regarding them as outside of the scope of the existing positive law human rights. [...] *There's always going to be an interpretative boundary of contestation about what counts, what is sufficiently linked to existing principles and what isn't.*”⁴⁶ (*Emphasis added.*)

30. In the next (fifth) and last public meeting of the Commission on Unalienable Rights, held in February 2020, a representative of Amnesty International asked the Commission members why they had not otherwise discussed those and other legitimate lawful avenues for participation in the development of international human rights law, by which the US government can robustly advance its vision of the scope and content of its binding obligations.

31. Additionally, Amnesty International asked the Commission members why they had not sought to invite to their public or private meetings any expert from a UN treaty body, a Special Procedure mandate holder, or a representative of the UN human rights agency (OHCHR) – in order to clarify concerns the Commission may have about supposedly expansive interpretations of international human rights (“new rights”), since this had been such a central and recurring thematic concern of the Commission.

32. None of the members of the Commission was willing to provide a substantive answer to either query by Amnesty International. The chair of the Commission simply deflected that the Commission was unable to invite all speakers from whom it might want to hear.

III. What role should human rights play in US foreign policy?

33. Marking the 30th anniversary of the UDHR in 1978, President Jimmy Carter stated: “Human rights is the soul of our foreign policy, because human rights is the soul of our sense of nationhood.”⁴⁷

⁴⁴ Mr. Roth is the executive director of Human Rights Watch.

⁴⁵ See, Kenneth Roth, “Prepared Testimony to Commission on ‘Unalienable’ Rights” (10 January 2020), available at: <https://www.hrw.org/news/2020/01/10/prepared-testimony-commission-unalienable-rights>.

⁴⁶ Remarks of Mr. Carozza, at the fourth meeting of the Commission on Unalienable Rights (10 January 2020).

⁴⁷ See, Department of State, Remarks by President Carter on the Universal Declaration of Human Rights (6 December 1978), available at: <https://history.state.gov/historicaldocuments/frus1977-80v01/d101>.

34. Upon transmission of four human rights treaties to the Senate in 1978, however, President Carter cautioned: “Our failure to become a party increasingly reflects upon our attainments, and prejudices United States participation in the development of the international law of human rights.”⁴⁸

35. Under President George H. W. Bush, the Department of State advocated for the Senate to start ratifying one major human rights treaty per year.⁴⁹ That goal imagined an ambitious overhaul of human rights rhetoric to better lead the democratic world by example during and after the collapse of the Soviet Union.

36. The Commission on Unalienable Rights should take this opportunity to recommend that the Department of State renew its dedication to and participation in the development of international human rights law, including by encouraging the US government to take on new human rights treaty commitments, and by contributing positively to the drafting process of potential new instruments.⁵⁰

37. In its first submission to the UN Human Rights Council under the Universal Periodic Review (UPR) process in 2009, the United States recognized that participation in the Council’s peer-review system allows the government not only to lead by example and “encourage others to strengthen their commitments to human rights,” but also to address domestic human rights shortcomings.⁵¹

38. In 2015, during the last UPR of the United States by the Human Rights Council, the US government committed to engage Special Procedure mandate holders and UN treaty bodies in a constructive fashion on US implementation of its human rights obligations.⁵² Since 2017, however, the United States has moved in the opposite direction. Most dramatically, the Department of State announced its withdrawal from the UN Human Rights Council in June 2018.⁵³

39. The US government has also not responded to numerous communications from UN Special Procedure mandate holders, and it has failed to accept their requests for

⁴⁸ See, President Carter, “Human Rights Treaties, Message to the Senate” (23 February 1978), available at: <https://www.presidency.ucsb.edu/documents/human-rights-treaties-message-the-senate>. Two of those four human rights treaties remain before the Senate without ratification: the International Covenant on Economic, Social and Cultural Rights; and the American Convention on Human Rights.

⁴⁹ See, Mark Kirk, “Should the United States ratify the American Convention on Human Rights?” (San José: *Revista IIDH*, Vol. 14; 1991), pp. 65-89, at p. 67, footnote 10. Available at: <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/14/dtr/dtr4.pdf>. Kirk cites to the Department of State’s Memo to the Secretary (5 June 1991).

⁵⁰ For instance, the draft Articles on Prevention and Punishment of Crimes against Humanity (available at: https://legal.un.org/ilc/guide/7_7.shtml), and Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes. See, Amnesty International, *Recommendations for a Convention on Mutual Legal Assistance* (16 January 2020), available at: <https://www.amnesty.org/en/documents/ior51/1651/2020/en/>.

⁵¹ See, National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1, Working Group on the Universal Periodic Review, United States of America, UN Doc. A/HRC/WG.6/9/USA/1 (2010), available at: <http://hrlibrary.umn.edu/UPR-usa2010.html>.

⁵² Report of the Working Group on the Universal Periodic Review (United States of America). Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review. UN Doc. A/HRC/30/12/Add.1 (14 September 2015), at paras. 15, 20, 21. Available at: <https://undocs.org/A/HRC/30/12/Add.1>.

⁵³ See, Remarks by Secretary of State and US ambassador to the UN, at n. 20 above.

invitations for official visits since January 2018.⁵⁴ In a July 2019 letter to Amnesty International, the US government indicated that it now cooperates with UN Special Procedure mandate holders only when their mandates and activities “advance US foreign policy objectives,”⁵⁵ thereby implicitly declining to cooperate with their examinations of the human rights situation within the United States.

40. The US government has similarly disengaged from the Inter-American Commission on Human Rights, failing most recently to participate in high-level hearings in December 2019 in Washington, DC, including a joint session on the right to freedom of peaceful assembly, featuring both the IACHR Special Rapporteur for Freedom of Expression, and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.⁵⁶

41. The Department of State’s creation of this Commission has raised similar concerns that its use of the Commission’s forthcoming report could be aimed to further undermine and disengage from the international human rights system, resulting in the violation of non-derogable protections from discrimination, among other human rights.

42. The US government is indeed already in default of numerous international human rights obligations – including many obligations that this Commission would not find to be the least bit ambiguous or contentious (e.g. the prohibition on torture and other forms of cruel, inhuman, or degrading treatment or punishment; the prohibition on *refoulement* of refugees and others to persecution or serious human rights abuses; and numerous others).⁵⁷ In April 2020, the current US government administration apparently embraced as national policy on its southern land border the disregarding and violation of its international obligations under human rights treaties, with the Department of State claiming that those obligations are not directly enforceable on the domestic level.⁵⁸

⁵⁴ See, Joint statement of Amnesty International and the International Service for Human Rights to the Human Rights Council, 41st session, “Cooperation with Special Procedures” (Item 5, General Debate), available at: <https://www.amnesty.org/download/Documents/IOR4007742019ENGLISH.pdf>. See also, The Guardian, “US halts cooperation with UN on potential human rights violations” (4 January 2019), available at: <https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations>.

⁵⁵ Letter from the US Department of State to Amnesty International (19 July 2019). The letter was in response to the joint statement by Amnesty International and ISHR in June 2019. Ibid.

⁵⁶ See, Presentation of the thematic Report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, on Protest and Human Rights (20 December 2019), available at: <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1161&IID=1>.

⁵⁷ See, e.g., Amnesty International report, *‘You Don’t Have Any Rights Here’: Illegal Pushbacks, Arbitrary Detention and Ill-treatment of Asylum-seekers in the United States* (October 2018), available at: <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

⁵⁸ See, email from Senior Congressional Advisor (Bureau of Legislative Affairs) with the US Department of State (dated 24 April 2020), available at: <https://foreignaffairs.house.gov/cache/files/1/5/15b9fb59-24f7-44e1-a8dd-b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf>. For reporting on the context of the email, see, Oona Hathaway, “The Trump Administration’s Indefensible Legal Defense of Its Asylum Ban: Taking a Wrecking Ball to International Law” (15 May 2020), available at: <https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/>. While the Department of State cited to legal theories on “self-executing” versus “non-self-executing” treaties (based on an incorrect reading of the *Medellin v. Texas* decision of the Supreme Court of the United States), the matter at hand was in relation to US obligations under the UN Convention against Torture and under international refugee law, with regard to both of which the US has

43. If the US government aims to present itself as a leader in the human rights field, it must not only halt its heinous violations of human rights at home, but also must re-engage the international community through UN human rights institutions in a constructive fashion that promotes and advances the human rights project.

44. Toward that end, the Commission on Unalienable Rights should encourage the US government to rejoin the Human Rights Council, and more fully engage the Council's Special Procedures as well as UN human rights treaty bodies, through constructive discourse. That discourse can include any meaningful challenges to the interpretations of treaty obligations in line with international law, but utilizing the adequate existing channels of those institutions to do so.

45. In order to strengthen and broadcast the United States' public commitment to international human rights law and standards, the Commission should also recommend that the Department of State encourage the Senate finally to offer its consent for the ratification of the human rights treaties long awaiting approval by the Senate Foreign Relations Committee; alongside the Vienna Convention on the Law of Treaties, which the United States still has yet to ratify, even if simply symbolically as the government recognizes the treaty largely to codify customary international law.⁵⁹ Likewise, the Commission may also encourage the withdrawal of a number of reservations made to human rights treaties upon signature or ratification, prioritizing those which are not in conformity with the object and purpose of the respective treaties.

46. Rather than advancing human rights only when in line with the “national interests”⁶⁰ or “national traditions” of the United States, the Commission should encourage the US Department of State to return to the longstanding position of previous administrations that recognized, in conformity with the UDHR and subsequent pronouncements of the international community: “All human rights are universal, indivisible and interdependent and interrelated.”⁶¹ The World Conference on Human Rights in 1993 culminated in that declaration, which reflected US leadership to some extent,⁶² in recognizing the interdependence and indivisibility of human rights as a fundamental principle. The United States and other governments at the conference also reaffirmed as universal, indivisible, and “*inalienable*” the human rights to self-determination and development, and the human rights of women and girls, among others.⁶³

anyhow enacted implementing legislation to enforce its treaty obligations on the domestic level.

⁵⁹ See, International Law Institute, *Digest of United States Practice in International Law* (2001), at n. 34 above.

⁶⁰ In June 2018, Secretary Pompeo justified the United States' abandoning of its seat on the Human Rights Council, claiming that the body “undermine[d] our national interests and [...] infringe[d] on our national sovereignty.” See, US Department of State, “Remarks by Mike Pompeo, Secretary of State and Nikki Haley, US Permanent Representative to the United Nations” (19 June 2018), at n. 20 above.

⁶¹ See, Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna (25 June 1993), available at: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

⁶² See, the *UNESCO Courier: a window open on the world* (March 1994); XLVII, 3; Antoine Bernard, “One and Indivisible: The dangers of an à la carte approach to human rights,” pp. 15-17 (at 17). Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000096121>.

⁶³ See, Vienna Declaration and Programme of Action, at n. 61 above, at: Section 1, paras. 2, 10, and 18; and Section 2, para. 72.

47. The full realization and protection of human rights, without discrimination, is indisputably always in the United States' "national interest" – and should likewise always be among its "foreign policy objectives."

48. In contrast, a "buffet" approach to interrelated human rights – where the US government, or any commission thereof, designates certain human rights as central or fundamental while disregarding others – will only undermine human security, exacerbate conflict, and encourage other governments to utilize "cultural relativism" arguments, which have been roundly rejected by the international community for years. For the US government to deny equal protection of human rights to women, LGBTI people, or "other" social groups, in violation of the principle of non-discrimination, likewise paves the way for more widespread abuses by some governments around the world under the cover of cultural relativism.

49. It is lamentable that the Commission was unable in its five public meetings to secure the attendance of, and engage, any representatives of international human rights institutions, in order to be challenged on one of its most central preconceived criticisms: the role of elected UN experts and human rights treaty body members in the interpretation and application of international treaty obligations that they have competence to review.

50. The Commission should temper its findings accordingly in relation to those UN mechanisms, and as much as possible encourage the Department of State to engage UN and other human rights institutions, including through the clear and well-established parameters for the development, accession to, application, and interpretation of human rights treaties.

51. In the service of transparency and credibility, the Commission should also include in its written report a full list of all individuals that any Commission members have had contact with about the Commission's work since its establishment – as well as the topics they discussed – whether in "closed preparatory sessions," virtually, or otherwise.

52. Amnesty International is grateful to the Commission on Unalienable Rights for considering this written submission, and hopes that it accepts both the criticisms and enclosed recommendations in a constructive manner as it finalizes its written advisory report to the Secretary of State.

Recommendations to the Commission on Unalienable Rights:

- Immediately collate and make publicly available all Commission records, as required under the Federal Advisory Committee Act.
- Recommend to the Department of State that it reaffirm the longstanding position of the US government and the international community that: “All human rights are universal, indivisible and interdependent and interrelated.”
- Recommend to the Department of State that it urge the US government to renew its dedication to, and participation in, the development of international human rights law, including by taking on new human rights treaty commitments.
- Recommend to the Department of State that it re-engage the international community through UN and regional human rights institutions in a constructive fashion that promotes and advances the global protection of all human rights.
- In particular, recommend that the Department of State:
 - Encourage the US government to rejoin the Human Rights Council; and
 - Engage more fully the Human Rights Council’s Special Procedures, as well as UN human rights treaty bodies, through constructive discourse that is not conditioned on escaping criticism of the US human rights record.
- Recommend to the Department of State that it address meaningfully and openly in multilateral fora the violations of human rights in the United States, with an aim to remedy those shortcomings – including under the auspices of the next UPR of the United States in November 2020.
- Include in the public-facing advisory report of the Commission a full list of all individuals that its members have been in contact with about the Commission’s work since its establishment – as well as the topics they discussed – whether in “closed preparatory sessions,” virtually, or otherwise.

INDEX: AMR 51/2375/2020
MAY 2020
LANGUAGE: ENGLISH

amnesty.org

**AMNESTY
INTERNATIONAL**

